NATIONAL PANASONIC (MALAYSIA) SDN BHD

v.

LEM TEH SEM & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 2-22-91-2002]
30 JULY 2003

CIVIL PROCEDURE: *Appeal - Appeal against summary judgment - Striking out writ and statement of claim - Whether contravened rules - Rules of the High Court 1980 O. 6 r. 2(1), O. 14, O. 18 rr. 15 & 19(1)(d)*

The plaintiff claimed against the first defendant for the sum of RM422,083.13, being the balance of the purchase price for electrical goods sold and delivered to the first defendant. Further, the plaintiff claimed against the second defendant as a guarantor thereof. The defendants filed two notices of appeal against two orders of the registrar that: (i) allowed the plaintiff's application for summary judgment; and (ii) dismissed the defendants' application to strike out the writ and statement of claim under O. 18 r. 19(d) of the Rules of the High Court ("RHC"). The grounds of appeal were that: (i) the plaintiff had failed to deliver the goods in question; (ii) there was discrepancy in the amount claimed; (iii) late payment charges had been unilaterally imposed; (iv) one of the guarantors was the first defendant himself and since the first defendant was a firm the guarantee was not legally sustainable; (v) there was no letter of demand; (vi) plaintiff's counsel had no *locus standi* to act for the plaintiff; and (vii) there were material contradictions in the claim that contravened O. 6 r. 2(1) and O. 18 rr. 15 & 19(1)(d) RHC.

Held (dismissing the appeal and affirming summary judgment):

[1] The submission of non delivery defied logic and common sense as, if there had been no delivery there was no reason for the defendants to have submitted part payments for the goods and requested to be allowed to pay by instalments. (p 413 c)

[2] The allegations of discrepancy in the amount claimed as well as a unilateral imposition of late payment charges had run counter to contemporaneous documents such as the invoices, delivery orders and statements of account which had been duly delivered to the first defendant. (p 413 g)

[3] The guarantee is valid as the first defendant was a sole proprietor who may sue and be sued in such capacity. It is proper and regular for the first defendant to be sued as an individual. (p 413 h)

[4] The alleged absence of a notice of demand to enforce the guarantee is a red herring and rhetorical as the letter of demand by the plaintiff's solicitors was handed to the defendant's solicitors who in turn requested for documents evidencing debt (which was duly accommodated to). (p 414 a-b)

[5] In regard to the *locus standi* of the plaintiff's solicitor, there was no doubt that the solicitor had been retained by the plaintiff. It was thus not open for the defendants as strangers to question the lack of authority when the principal i.e. the plaintiff had given the solicitor the retainer. (p 413 e-f)

[6] The plaintiff's writ was indorsed with a 26-paragraph statement of claim with all particulars in compliance with O. 6 r. 2(1)(a) RHC. Further, it had also specified the debt or liquidated demand with a statement of the amount claimed in respect of the debt or demand and for costs, consistent with O. 6 r. 2(1)(b) RHC. The defendants' reliance on O. 6 r. 2(1) is therefore baseless. (p 416 h)

[7] The plaintiff's statement of claim was based on goods sold and delivered and had stated specifically the relief or remedy claimed. It was free from any complexity and had fulfilled the requirements of O. 18 r. 15 RHC. (p 417 c)

[8] The facts of the case and the plaintiff's claim for the price of goods sold and delivered was hardly an abuse of the process of the court under O. 18 r. 19(1)(d) RHC. On the facts, there was neither a *bona fide* defence nor any *bona fide* triable issue and the learned registrar was correct in entering summary judgment for the plaintiff. (pp 415 d-e & 417 d)

Case(s) referred to:

Emperee Industries Sdn Bhd v. Genagco Sdn Bhd [1987] 1 CLJ 477 HC ***(refd)***

Hong Leong Finance Berhad v. Rextex Rubber Products (M) Sdn Bhd & Anor [1996] 4 CLJ 580 HC ***(refd)***

Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong [1987] 1 MLJ 139 ***(refd)***

Lek Chuan (M) Sdn Bhd v. Shahpadu Properties Sdn Bhd [1995] 1 LNS 110 ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(refd)***

Sykt Pakar Kayu & Perdagangan Sdn Bhd v. MAA-SK Sdn Bhd [1986] 1 CLJ 595 HC ***(refd)***

Team 1O8 Technical Services v. Hujong Enterprises (Pte) Ltd [1987] 1 MLJ 272; [1986] 1 LNS 9 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 6 r. 2(1), O. 14, O. 18 rr. 15, 19, O. 18 r. 19(1)(d)
Sale of Goods Act 1957, s. 31
Subordinate Courts Rules 1980, O. 26A

For the plaintiff - Mogan Karupiah; M/s Moglan Karupiah
For the defendants - J Shamsesh; M/s Jeevaretnam & Co

Reported by Yasmin Norhazleena

JUDGMENT

Low Hop Bing J:

Appeals

The defendants have filed two notices of appeal against two orders of the learned registrar made on 29 November 2002:

1. allowing plaintiff's application for summary judgment in encl. (31); and

2. dismissing defendant's application to strike out the plaintiff's writ and statement of claim under O. 18 r. 19(d) of the Rules of the High Court 1980, in encl. (33).

Factual Background

The plaintiff's claim against the first defendant is for the sum of RM422,083.13 as at 30 April 2002, being the balance of the purchase price for electrical goods ("the goods") sold and delivered to the first defendant, and against the second defendant as a guarantor for the same amount, on the basis of the guarantee executed by the defendants on 1 November 1999 in favour of the plaintiff.

The first defendant has a running account with the plaintiff until this action was filed.

As at 31 January 2002, the first defendant was indebted to the plaintiff in the sum of RM403,440 for which the first defendant gave the plaintiff a cheque of the same date, signed by the second defendant and another person by way of settlement thereof. However upon presentation for payment, the cheque was dishonoured on ground of "stop payment".

The first defendant then issued to the plaintiff three cheques, one dated 22 March 2002 while the other two were dated 29 March 2002, for the sum of RM88,360 each towards part payment of his debt to the plaintiff, but two of them were also returned on the same ground.

The first defendant also additionally issued three undated cheques to the plaintiff, amounting to RM77,241.68 each towards part payment of the debt to the plaintiff but the plaintiff did not present them for payment.

The final account of the first defendant with the plaintiff as at 28 February 2002 showed a debt of RM408,788.55 and late payment charges of RM13,294.58, thereby amounting to RM422,083.13.

The first defendant *vide* letter, dated 30 March 2002 signed by the second defendant and addressed to the plaintiff, requested to make repayment of the outstanding sum of RM408,788.55 as at 28 February 2002 by way of each monthly payment at 8% thereof for 11 months from April 2002 to February 2003 and the balance of 12% in March 2003.

The defendants' solicitors *vide* letter dated 22 April 2002 requested the plaintiff to "stop the banking in of the cheque" for RM88,360 dated 19 March 2002, but made no payments as requested in the letter dated 30 March 2002, as a result of which, on 30 April 2002, the plaintiff's solicitors issued a notice of demand together with all supporting documents as requested by the first defendant's solicitors, claiming from the first defendant as principal debtor the sum of RM422,083.13, to be paid within seven days therefrom.

Also on 30 April 2002, the plaintiffs solicitors sent a similar letter of demand claiming the same amount from the second defendant as the guarantor.

On 16 May 2002, the plaintiff's solicitors received an undated letter "BY FAX/ POST" from the defendants' solicitors to the effect that "Our instructions are to deny the content of your letter. We shall strongly resists (sic) all forms of action your clients intend to take against our client".

On 22 May 2002, the plaintiff filed this suit against the defendants.

Summary Judgment

En J Shamsesh, learned counsel for the defendants, submitted that the plaintiff has failed to deliver the goods to the first defendant and that there was discrepancy in the amount claimed by the plaintiff.

He added that the late payment charges were unilaterally imposed by the plaintiff.

In respect of the guarantee, it was argued that one of the guarantors was the first defendant himself and the guarantee is not legally sustainable as the first defendant is a firm, and that there was no letter of demand.

It was then said that the plaintiff's counsel has no *locus standi* to act for the plaintiff.

En Mogan Karupiah, learned counsel for the plaintiff, submitted that there was an admission by the first defendant who requested to pay the debt by instalments in his letter dated 30 March 2002, and that the issues raised for the defendant were the result of an afterthought.

At this stage, it is pertinent to reiterate the relevant principles governing O. 14 judgment.

Seah FJ in delivering the judgment of the Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 eludicated as follows:

> ... For the purposes of an application under Order 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
>
> ... If ... these considerations are satisfied, the
>
> plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him (see Order 14 Rules 3 and 4(1)).

A perusal of the cause papers revealed that the defendants herein entered appearance on 21 June 2002, the statement of claim having been served on the defendants and the plaintiffs affidavit having complied with O. 14 r. 2.

In the circumstances, the burden is now cast on the defendants to rebut the *prima facie* case.

The defendants may do so by setting up a *bona fide* defence or raising a *bona fide* triable issue, though a complete defence need not be shown. Whether or not a defence is *bona fide* or an issue is *bona fide* triable depends on the facts or the law arising from each case. The court is not to delve into the merits of the issues raised by the defendants or whether the defendants are likely

to succeed or fail: *Hong Leong Finance Berhad v. Rextex Rubber Products (M) Sdn Bhd & Anor* [1996] 4 CLJ 580 per Abdul Malik Ishak J and the cases cited there.

In my view, the first defendant's allegation of non-delivery of the goods is unsustainable as the first defendant had a running account with the plaintiff and that the first defendant has vide letter dated 30 March 2002 admitted owing the amount of RM408,788.55 by requestisng to pay in 12 instalments, viz. 11 instalments at 8% thereof per instalment and a final instalment at 12% thereof.

In my view, the submission for the defendants defies logic and common sense. If at all there had been no delivery of the goods, why did the defendants make part payments therefor by way of cheques and then requested for payment by instalments?

It is elementary that the first defendant to whom the goods had been sold and delivered has a duty to pay for the goods or else the ordinary business of commerce and industry would result in chaos. Hence, s. 31 of the Sale of Goods Act 1957 provides that:

> it is the duty of the seller to deliver the goods and of the buyer to accept and **pay for them** in accordance with the terms of the contract of sale [emphasis added]

As regards the *locus standi* of the solicitor to represent the plaintiff, I am of the view that the learned counsel for the defendants had nothing better to rely on. There can be no doubt that it is the plaintiff's retainer for a solicitor and that it is not open to the defendants as strangers to question the lack of authority when the principal ie, the plaintiff has given the solicitor the retainer.

The allegation that there was a discrepancy in the amount claimed by the plaintiff and that the late payment charges were unilaterally imposed by the plaintiff clearly run counter to contemporaneous documents such as invoices, delivery orders and statements of account which have been duly delivered to the first defendant who had not disputed them but had made part payments thereon by way of cheques, some of which were dishonoured.

In respect of the guarantee executed by the defendants in favour of the plaintiff, I am unable to accept the contention that it is invalid simply on the ground that the business name of the first defendant was used. The first defendant is a sole proprietor ie, an individual trading under the style and business name of New Trading Centre. A sole proprietor may sue and be sued in that capacity. Here, the first defendant has been sued as an individual and that certainly is proper and regular.

The alleged absence of a notice of demand to enforce the guarantee is in my view a red herring and rhetorical as the letter of demand by the plaintiffs solicitors has been handed to the defendants' solicitor who has asked to be supplied and has in fact been supplied all the supporting documents as evidence of the debt. In the face of such contemporaneous documents, the audicity of the defendants' counsel to raise the absence of a notice of demand is beyond my power of comprehension.

In *Pernas Trading Sdn Bhd v. Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, Pernas sued Persatuan Peladang Bakti (BAKTI) for the balance of the price of goods sold and delivered to BAKTI, but BAKTI denied liability and sought to show that the goods were ordered for a third party. Both the learned registrar and the learned judge of the High Court dismissed the application by Pernas for summary judgment under O. 14. On appeal, the Federal Court through the judgment of Salleh Abas FJ (later LP) held that from the sales invoice and delivery note, the goods were ordered by BAKTI which was therefore liable, as a result of which summary judgment was entered for Pernas.

The above Federal Court decision was followed by Sinnathuray J of the Singapore High Court in *Team 108 Technical Services v. Hujong Enterprises (Pte) Ltd* [1987] 1 MLJ 272, where the material facts showed substantial similarity with those in *Pernas.* The learned judge allowed the plaintiff's appeal against the registrar's refusal to enter summary judgment for the plaintiff, and the learned judge's decision was affirmed by the Singapore Court of Appeal.

In the appeal before me, there was a mere denial by the defendant but such mere denial has been held to be insufficient: per Chong Siew Fai J (later CJ (SS)) in *Huo Heng Oil Co (EM) Sdn Bhd v. Tang Tiew Yong* [1987] 1 MLJ 139 where the learned judge allowed the plaintiff's appeal against the then president of the sessions court's refusal to enter summary judgment under O. 26A of the Subordinate Courts Rules 1980. Summary judgment was hence entered for the plaintiff.

In *Emperee Industries Sdn Bhd v. Genagco Sdn Bhd* [1987] 1 CLJ 477, the plaintiff's claim is also for the price of goods sold and delivered and summary judgment was entered for the plaintiff by the learned registrar and on appeal by VC George J (later JCA), striking down the defendant's contention of not having ordered the goods, despite the existence of delivery orders, invoices and statements of account.

In *Sykt Pakar Kayu & Perdagangan Sdn Bhd v. MAA-SK Sdn Bhd* [1986] 1 CLJ 595, in response to the plaintiff's application for summary judgment, the defendant took a stand somewhat different from the stand taken by para 3 of the defendant's own statement of defence and complained that the plaintiff had supplied more goods than ordered, short supplied sawn timber in the lengths required and over supplied timber at greater lengths than ordered and had also supplied timber not ordered at all. VC George J (later JCA) concluded that the complaints were a sham and did not provide any or any reasonable defence.

Where a few delivery orders were not duly stamped though signed and annotated when the statements of account were presented to the defendants who duly made some payments to the plaintiff, in *Lek Chuan (M) Sdn Bhd v. Shahpadu Properties Sdn Bhd* [1995] 1 LNS 110, Haidar J (now CJ(M)) held that the plaintiff and the defendant were not strangers in respect of the materials supplied by the plaintiff, and that the defendant has not succeeded in raising a triable issue. Hence, summary judgment was entered for the plaintiff.

In my view, the facts in this appeal show a plain and obvious case on the facts and the law and there is neither a *bona fide* defence nor any bona fide triable issue.

Hence, I hold that the learned registrar is correct in entering summary judgment for the plaintiff under O. 14. I hereby affirm it. The defendant's appeal is hence dismissed with costs.

Order 18 r. 19(d)

In respect of the learned registrar's order dismissing the defendants' striking out application, reliance was placed on alleged material contradictions in the plaintiff's claim for RM422,083.13 as follows:

	Particulars	Amount (RM)
1.	Paras 4 to 8 of plaintiff's statement of claim	422,083.13
2.	Para 7 of the defendants' affidavit in encl. 10	403,440.00
3.	Para 4 to para 6 of the plaintiff's statement of claim	422,034.13
4.	Para 7 of the plaintiff's claim as at 16 January 2002	408,788.55
5.	Para 9 of the plaintiff's Statement of claim as at 30 January 2002	403,440.00

6. Para 9 of defendants' affidavit. Defendants have paid RM226,720.00	422,034.13 226,720.00	
7. Paras 12 and 13 of the defendant's affidavit, the debt as at 31 January 2002	403,440.00 21,998.00	-
8. Para 9 of the plaintiff's statement of claim, as at 30 January 2002	403,440.00	
9. Para 12 of the plaintiff's statement of claim, as 31 January 2002	430,440.00	

It was hence contended for the defendants that the plaintiff's claim was wrong and so was an abuse of the process of the court.

In response, the plaintiff's learned counsel submitted that the defendants' application is "totally misconceived in law, wholly unsustainable and hopelessly devoid of any merits".

After a proper perusal of defendants' said application, I observe that the defendants have relied on O. 6 r. 2(1), O. 18 r. 15 and r. 19(1)(d).

Order 6 r. 2(1), where relevant, merits reproduction as follows:

> (1) Before a writ is issued it must be indorsed:
>
> (a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;
>
> (b) where the claim made by the plaintiff is for a debt or liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs.

Before me, the plaintiff's writ has been indorsed with a 26-paragraph statement of claim, with all particulars in compliance with O. 6 r. 2(1)(a). Further, it has also specified the debt or liquidated demand with a statement of the amount claimed in respect of the debt or demand and for costs, consistent with O. 6 r. 2(1)(b). The defendants' reliance on O. 6 r. 2(1) is therefore wholly baseless.

Order 18 r. 15 provides for the statement of claim in the following words:

(1) A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

(2) A statement of claim must not contain any allegation or claim in respect of a cause of action unless that cause of action is mentioned in the writ or arises from facts which are the same as, or include or form part of facts giving rise to a cause of action so mentioned; but, subject to that, a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the indorsement of the writ without amending the indorsement.

In my view, the plaintiff's statement of claim is based on goods sold and delivered and has stated specifically the relief or remedy claimed and is free from any complexity. There is no doubt in my mind that it has fulfilled the requirements of O. 18 r. 15.

The contention that the plaintiff's claim is otherwise an abuse of the process of the court under O. 18 r. 19(1)(d) is in my view a figment of imagination of the defendants' learned counsel as all the contemporaneous documents, invoices, statement of account and part payments made by the defendants showed otherwise and have indeed negated the said contention.

The facts of the case as alluded to above and the claim for price of goods sold and delivered can hardly be an abuse of the process of the court.

The aforesaid submissions were raised by the defendant's counsel in the face of the defendants' own admission of the outstanding sum of RM408,788.55 as at 30 March 2002 which has been so clearly stated in the letter of the same date, bearing the first defendant's letterhead and signed by the second defendant, wherein the proposed instalment payments requested by the first defendant are as follows:

Monthly payment (RM)	Total (RM)
1. 8% of 408,788.55 for 11 months	359,733.92
2. 12% of 408,788.55 for the 12th month	49,054.626
3. Late payment charges as at 28 February 2003	13,294.58
Total Amount claimed by plaintiff	422,083.13

In my view, the figures averred to in the defendant's affidavits and used by the counsel were manifestly misconceived and misleading.

It is fundamental that O. 18 r. 19 gives the court a discretionary power to dismiss an action summarily but such drastic power should only be exercised in plain and obvious cases: see *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 CLJ 257 CA and the cases cited therein. It is elementary that the plaintiffs claim can only be struck out under O. 18 r. 19(1)(d) if it is conspicuously unsustainable.

In my judgment, defendants' learned counsel has in his submissions shown his competent best as a legal acrobat. He has effectively exhibited an an inexhaustible idealism and demonstrated endless efforts constituting an exercise in futility. He has repeated the same *modus operandi* for the first defendant herein who was the defendant in Melaka High Court No. 22-101-2002 involving substantially similar facts but with no measure of success.

It is not difficult for a reasonable man to observe that the defendants' counsel has been performing and pursuing the pivotal role of a professional time-seeker in an otherwise simple and straightforward claim for the price of goods sold and delivered.

Conclusion

The inevitable result is that the defendants' appeals have no grounds to stand on and are hereby dismissed with costs.